

United States Department of Labor
Wage and Hour Division
Wage and Hour Division (WHD)

U.S. Department of Labor

Wage & Hour Division
Washington D.C. 20210

July 27, 2016

FIELD ASSISTANCE BULLETIN NO. 2016-2

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
DISTRICT DIRECTORS

FROM: Dr. David Weil
Wage and Hour Administrator

SUBJECT: WHD Enforcement of WIOA Limitations on Payment of Subminimum Wages
under FLSA Section 14(c)

This memorandum provides guidance to Wage and Hour Division (WHD) field staff regarding the limitations placed by the Workforce Innovation and Opportunity Act (WIOA) on the payment of subminimum wages under section 14(c) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 214(c), which take effect on July 22, 2016. Specifically, it describes the new obligations placed by WIOA on an employer who holds a 14(c) certificate that authorizes the payment of subminimum wages under the FLSA.

I. Background

WIOA was enacted on July 22, 2014 to help job seekers access employment, education, training, and support services to succeed in the labor market and to match employers with the skilled workers they need to compete in the global economy. Specifically, the law is intended to streamline, consolidate, and improve workforce development and training services for various groups, including displaced workers, youth, and workers with disabilities. WIOA also provides for the transition to new governing authority for various workforce development programs that are realigned and/or administered jointly by various agencies, including the Department of Education (ED) Office of Special Education and Rehabilitative Services (OSERS) and the Department of Labor (DOL) Employment and Training Administration (ETA) and Wage and Hour Division (WHD).

Section 458 of WIOA amends Title V of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, a statute that addresses employment and other issues related to individuals with disabilities. WIOA added a new section 511 to the Rehabilitation Act that is codified at 29 U.S.C. 794g. This provision limits the ability of certificate holders to pay a subminimum wage to workers with disabilities under section 14(c). WHD has authority to administer and enforce the new requirements imposed by WIOA, effective July 22, 2016. WHD will begin enforcing the WIOA requirements in its section 14(c) program on July 22, 2016.

II. Authority and Jurisdiction of WHD to Enforce WIOA Requirements

The Secretary of Labor possesses authority to enforce the terms under which individuals are employed at a subminimum wage. The Secretary of Labor's enforcement authority is conferred by the FLSA. The Secretary of Labor is empowered to administer and enforce the minimum wage and overtime requirements set forth in sections 6 and 7 of the FLSA, to issue and revoke subminimum wage certificates, and to remedy unauthorized payment of subminimum wages. See 29 U.S.C. 206, 207, and 214(c); 29 CFR Part 525.

Section 511 states that its provisions "shall be construed in a manner consistent with the provisions of the Fair Labor Standards Act of 1938 (29 U.S.C. 201 *et seq.*), as amended before or after the effective date of this Act." Section 511 requires payment of the minimum wage by employers with 14(c) certificates who have not met the requirements of that section for each employee who would otherwise be eligible for payment at a subminimum wage. Accordingly, if an employer fails to comply with any of the section 511 criteria for payment of a subminimum wage, the Secretary may assess back pay and any other appropriate relief in the same manner as he would against any other employer who failed to pay the minimum wage as required by section 6 of the FLSA. WHD is authorized to seek back pay at the full minimum wage rate for each individual for whom the mandatory services and/or documentation is not provided or does not meet established criteria.

The Secretary of Labor's authority to review the relevant documentation to determine whether an employee is eligible to be paid a subminimum wage under WIOA (in order to determine whether it is appropriate to initiate an enforcement action against the employer) is established by section 511(e)(2)(B) of the Rehabilitation Act, as well as section 11 of the FLSA, 29 U.S.C. 211. Section 511(e)(2)(B) gives "the designated State unit or the Department of Labor" the right to review such documentation "in such a manner as may be necessary to fulfill the intent of this section, consistent with regulations established by the designated State unit or the Secretary of Labor." Section 11 of the FLSA provides authority to investigate "wages, hours and other conditions and practices of employment" in order to enforce its statutory requirements. See also 29 CFR 525.16. The Secretary of Labor will review documentation required under section 511 in a manner consistent with this investigatory authority.

III. WIOA Requirements

In addition to the existing requirements under section 14(c), WIOA establishes two new requirements that must be met in order for a worker with a disability to be paid a subminimum wage: 1) Individuals with disabilities 24 and younger¹ (youth) must be provided with various services designed to improve their access to competitive integrated employment, including transition services, vocational rehabilitation and career counseling services, **before** they are employed at a subminimum wage; and 2) All workers, including youth, must be regularly provided with career counseling and information about training opportunities as a condition of payment of a subminimum wage.

1. Youth cannot be paid a subminimum wage unless they have completed certain requirements

Certificate-holders cannot pay a subminimum wage to any youth unless the certificate-holder first obtains, reviews and verifies documentation showing that the youth has completed the three requirements described below as documented by the Designated State Unit (DSU). The DSU is typically the state Vocational Rehabilitation (VR) agency and a list of these agencies in each state can be found at <http://soar.askjan.org/IssueConcern/214>. The requirements which must be completed are as follows:

1. *Transition services* under the Individuals with Disabilities Act (IDEA) and/or *pre-employment transition services* under WIOA;²
2. *Vocational rehabilitation (VR)*, as noted:
 - a. the youth applied for VR services and was found ineligible OR
 - b. the youth applied for VR services and was found eligible AND
 - i. had an individual plan for employment (IPE) AND
 - ii. worked toward an IPE employment outcome for a reasonable period without success; AND
 - iii. the VR case was closed;³
3. *Career counseling*, including information and referrals to Federal and State programs and other

resources in the individual's geographic area.⁴

Employers must review, verify and **maintain copies** of documentation indicating that the youth has completed each of these requirements before the youth may begin work at a subminimum wage. DSUs are required to provide final documentation of completion of each of these services to the youth, who must provide it to the employer before beginning work at a subminimum wage. See Sec. 511(d)(2); 34 C.F.R. 397.10, .20. A DSU must generally provide the documentation to a youth within 45 days after completion of the service, and must provide a final cover sheet that itemizes each of the documents provided. 34 C.F.R. 397.10(c)(2)(i)(A), (c)(3).

Note: These new pre-hire requirements do not apply to youth who are already working at a subminimum wage as of July 22, 2016. However, these individuals must receive the annual career counseling and information that WIOA mandates for current employees.

2. No employee, including a youth, can continue to be paid a subminimum wage unless he or she is provided with career counseling and with information about training opportunities every six months for the first year of employment and annually thereafter

Certificate-holders are prohibited from paying subminimum wages to any individual with a disability, regardless of age, unless **the DSU** provides him or her with career counseling, information and referrals,⁵ and the **employer**⁶ provides information about local self-advocacy, self-determination, and peer mentoring training opportunities, every six months during the first year of employment, and annually thereafter. Sec. 511(c)(1), (2). The training opportunities may be provided by applicable Federal or State programs or other sources, but must not be provided by an entity that has any financial interest in the individual's employment outcome. Sec. 511(c)(1)(B). The Department of Education has interpreted this provision to mean that these training opportunities must not be provided by any entity that holds a 14(c) certificate. 34 C.F.R. 397.40(b)(2). WHD will enforce this interpretation in its investigations.

The employer is required to verify completion of these requirements and review any relevant documentation provided by the employee. Sec. 511(e)(2)(A). Employers are strongly encouraged to maintain copies of this documentation, as the employer will be requested to provide proof that the services were provided to all employees being paid a subminimum wage, and that verification and review have taken place. In the event of a WHD investigation, employers may be assessed back wages at the full minimum wage for each affected employee if it is determined that these requirements have not been met.

IV. Implementation of Section 511 Limitations

1. Pre-hire requirements for youth

As part of the hiring process, employers are required to request, review, verify and maintain copies of documentation for any youth who seek to enter subminimum wage employment for the first time. Employers must determine the age for all new hires after July 22, 2016 in order to determine who is covered by section 511(a)(2) and whether they have completed all three requirements prior to being paid at subminimum wage. WHD anticipates that, by the time they are ready to seek employment, youth with disabilities should have already received, completed and have documents proving that they have completed the requirements. Under ED's regulations, DSUs and educational agencies in each State are required to develop state-level processes for providing and exchanging the necessary information and documents.⁷

If the youth does not or cannot provide documentation that the requirements of section 511(a)(2) have been completed, the employer must pay full minimum wages until the youth provides the documentation. Prospective employers and employees are strongly encouraged to contact the VR agencies in their States to obtain services and documentation. A listing of such agencies in each State can be found at

<http://soar.askjan.org/IssueConcern/214>.

2. Counseling for current and newly-hired employees

Employers will also have to verify that each of their current 14(c) employees, regardless of age, receive the counseling they are entitled to under section 511 every six months during the first year of employment, and annually thereafter. Employers are strongly encouraged to contact the DSU in their State as soon as possible and make appropriate referrals in order to ensure that all current subminimum wage employees receive the mandatory career counseling within the required timeframes, *i.e.*, within the first six months of employment for anyone hired on or after July 22, 2016, and annually, or by July 22, 2017 for all current employees. Employers should also review any documents provided by the employee indicating that such counseling has been provided.

If the employer does not or cannot verify that the requirements of section 511(c)(1) and (c)(2) have been completed, the employer must pay full minimum wages until the counseling is provided.

3. Information for current and newly-hired employees

Finally, employers must also provide all current 14(c) employees with information about local self-advocacy, self-determination, and peer mentoring training opportunities every six months during the first year of employment, and annually thereafter, and must verify that they have done so. The training opportunities may be provided under applicable Federal or State programs or other sources, but must not be provided by an entity that has any financial interest in the individual's employment outcome including any entity that holds a 14(c) certificate. They must ensure that all current subminimum wage employees receive the mandatory information within the required timeframes, *i.e.*, within the first six months of employment for anyone hired on or after July 22, 2016, and annually, or by July 22, 2017 for all current employees.

If the employer does not or cannot verify that the requirements of section 511(c)(1) and (c)(2) have been completed, the employer must pay full minimum wages until the information is provided.

Note: Small business employers can satisfy the requirements of section 511(c)(1) by referring the individuals to the DSU in their State for the required counseling, information and referrals at the required intervals. An employer who claims this exemption may be required to prove that it falls into this category and that it has made the required referrals.

V. WHD Enforcement

To enforce these new provisions, Wage and Hour Investigators will request birthdates and start dates of all employees being paid a subminimum wage under section 14(c) who are hired on or after July 22, 2016. If any of these employees paid a subminimum wage are 24 or younger, documentation must be provided by the employer that each youth has completed all three requirements prior to being paid a subminimum wage. Employers will also be asked to provide documentation or other evidence that all employees, regardless of age, have been provided with the required career counseling and with information about local self-advocacy, self-determination, and peer mentoring training opportunities every six months for the first year of employment and annually thereafter. The training opportunities may be provided under applicable Federal or State programs or other sources, but must not be provided by an entity that has any financial interest in the individual's employment outcome, including any entity which holds a 14(c) certificate.

If an employer does not meet the requirements for the payment of a subminimum wage, back wages at full minimum wage will be due to each affected employee back to the date that the violation occurred. For example, the violation date could be:

- the hire date for a youth who has not completed all three pre-hire requirements prior to being paid a subminimum wage,

- six months after the start date for any employee who is hired on or after July 22, 2016 and is not provided with the required post-hire counseling and information within six months of employment, and/or
- up to one or more years for any current employee who is not provided with the required post-hire counseling and information annually after their first year of employment.

All current 14(c) employees are entitled to career counseling and information about training opportunities no later than July 22, 2017, and annually thereafter. The employer is prohibited from paying a subminimum wage to any employee who has not received the necessary counseling, and/or information, and would be required to pay the full minimum wage to each affected employee until the employee has been provided with the necessary counseling, and/or information.

Example 1

A certificate-holder under investigation by the WHD in December 2016 provides the Wage and Hour Investigator with documents showing that one 19-year-old employee is being paid a subminimum wage. These documents also show that this employee was hired in September 2016. The certificate-holder, however, cannot show that this employee has completed all three of the mandatory requirements under WIOA prior to being paid a subminimum wage. The employer is in violation of section 511 and the WHD will assess back wages beginning from that employee's start date at full minimum wage. The employer must continue to pay that employee the full minimum wage until the requirements are completed.

Note: If this employee was employed on July 22, 2016, there would be no violation as the new pre-hire requirements under WIOA do not apply to youth who are already working at a subminimum wage as of July 22, 2016. However, the employee must receive the annual career counseling and information that WIOA mandates for current 14(c) employees.

Example 2

A certificate-holder under investigation by the WHD in March 2017 provides the Wage and Hour Investigator with documents showing that there are no youth employed at a subminimum wage and that all employees being paid a subminimum wage were hired and began receiving a subminimum wage when the employer began operations on August 1, 2016. The employer claims to be unaware of the requirements under WIOA and the employees have not received the career counseling and information required every six months in the first year of employment.

The employer is in violation of section 511 and the WHD will assess back wages for each employee beginning from February 1, 2017 (six months after the start date of these employees) at full minimum wage. The employer also must continue to pay each employee the full minimum wage until the necessary career counseling and information about training opportunities are provided to each individual employee.

Conclusion

Under WIOA and section 14(c), certificate-holders may only pay and/or continue to pay employees with disabilities, including youth, a subminimum wage under section 14(c) if they comply with these WIOA obligations for each worker in the required timeframes. WHD will enforce these requirements. Please see the WHD Employment of Workers with Disabilities website at: <https://www.dol.gov/whd/workerswithdisabilities/> for more information.

Footnotes

¹ See 29 U.S.C. § 705(42); ED OSERS Final Rule, State Vocational Rehabilitation Services Program; State Supported Employment Services Program; Limitations on Use of Subminimum Wage, 34 CFR Parts 361, 363, and 397, 34 C.F.R. 361.5(c)(58), 34 C.F.R. 397.5(a)(14).

² *Transition services* may be provided by or through a school to a student with a disability under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1414(d), or by or through a DSU as *Pre-Employment Transition Services* under Rehabilitation Act Sec. 113, 29 U.S.C. 733. See Sec. 511(a)(2)(A); 34 C.F.R. 361.5(c)(42), (55); 361.48(a); 34 C.F.R. 397.5(a)(10), 397.5(b)(3), 397.20(a)(1). A school must generally provide documentation of transition services to a DSU within 30 days after completion of the service, and must provide a final cover sheet that itemizes the documentation provided. 34 C.F.R. 397.30(c)(1)(i), (c)(2).

³ *VR completion* must include documentation of application and either completion or ineligibility and reasons therefore. See Sec. 511(a)(2)(B); 29 U.S.C. § 722(a)(5)(C); 34 C.F.R. 361.48-.49; 34 C.F.R. 397.10, .20. If the youth was deemed eligible for VR services, he or she must also show completion of all services and case closure, including an individualized plan for employment (IPE), work toward IPE employment outcome for a reasonable period of time without success; and closure of the VR case. Sec. 511(a)(2)(B)(i)(II)(aa)-(dd); 29 U.S.C. 722; 34 C.F.R. 397.20(a)(2).

⁴ *Career counseling* must include information and referrals to Federal and State programs and other resources in the individual's geographic area that offer employment-related services and supports designed to enable the individual to explore, discover, experience, and attain competitive integrated employment, must not be for subminimum wage employment and must not directly result in subminimum wage employment. Sec. 511(a)(2)(B)(ii)(I) & (II); 34 C.F.R. 397.20(a)(3). The DSU must provide the counseling within 30 days of the VR ineligibility or case closure, and as noted above, must generally provide documentation of the services to the youth within 45 days after completion. 34 C.F.R. 397.20(a)(3)(ii)(c), 34 C.F.R. 397.10(c)(2)(i)(A).

⁵ The career counseling to be provided to employees by the DSU is the same as that provided to youth, as described in Sec. 511(a)(2)(B)(ii)(I) & (II) and 34 C.F.R. 397.20(a)(3). See 34 C.F.R. 397.40(a)(1). The DSU must generally provide documentation of the counseling to the individual within 45 days after completion of the counseling. 34 C.F.R. 397.40(d)(1)(i)(A).

⁶ Employers meeting the definition of *small businesses* (businesses with fewer than 15 employees) may refer employees to the DSU at the required intervals to provide all of these services. Sec. 511(c)(3). In such cases, the DSU must provide the information to the employees within 30 days of the referral, and must provide documentation of the services to the individual within 45 days after completion. 34 C.F.R. 397.40(b)(1), 34 C.F.R. 397.40(d)(1)(i)(A).

⁷ 34 C.F.R. 397.10.